IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 723

UNITED STATES OF AMERICA,
Appellant,

against

MASONITE CORPORATION, *et al.*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CELOTEX CORPORATION, APPELLEE, JOINED IN BY APPELLEE CERTAIN-TEED PRODUCTS CORPORATION.

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This is a direct appeal to this Court by the United States from a final judgment of the District Court for the Southern District of New York, entered September 27, 1941 (R. 884).

The judgment dismissed the plaintiff's Complaint on the merits.

The opinion of the District Court (R. 843-853) is reported in 40 Fed. Supp. 852. Its Findings of Fact and Conclusions of Law are at pages 870-884.

THE QUESTION PRESENTED

In 1933 Appellee Masonite Corporation, the owner of a basic patent covering the manufacture of a synthetic wood known as "hardboard", by a *del credere* agency agreement constituted the predecessor of The Celotex Corporation (this Appellee) its agent to sell such hardboard at prices determined by Masonite. Subsequently, an agreement in substantially the same form was made by Masonite with each of the other Appellees, including Certain-teed Products Corporation. These agreements were superseded by revised agency agreements in 1936 and again in 1941. The question presented to this Court is whether in the making of these agreements and the distribution of hardboard products thereunder the Appellees have violated the anti-trust laws of the United States (Act of July 2, 1890, c. 647, 26 Stat. 209, c. 690, 50 Stat. 693, 15 U. S. C., Sections 1 and 2, known as the Sherman Act).*

CONTENTIONS OF THE APPELLANT

The Appellant contends that in entering into the Agreement of 1933 Masonite and its agents combined and conspired to fix and maintain non-competitive prices and other terms and conditions of sale of hardboard and other building materials, to fix and maintain the terms and conditions of sale for hardboard, and to divide markets and allocate customers, all in violation of the Sherman Act; and that in entering into agreements in substantially the same form, the other Appellees joined this conspiracy.

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*The Bill of Complaint charges violation of Section 3 of the Clayton Act (R. 1) but apparently this charge is not being pressed (Appellant's brief, p. 2).

The Appellant contends that the decision of this Court in *United States* v. *General Electric Co.*, 272 U. S. 476 has no application, but argues, in the event of rejection of that contention by this Court, that the Court should overrule its decision in the *General Electric* case.

DECISION OF COURT BELOW

This case was tried in the Court below on a stipulation of fact signed by each of the parties, on certain additional stipulations, each between the plaintiff and a single defendant, to the effect that certain persons, if called by such defendant as witnesses, would give certain testimony (as to which the plaintiff offered no contradiction), and on the testimony of certain other witnesses given in open court.

By its decision the Trial Court rejected completely the contentions of the Government; it held that Masonite was the owner of a basic patent on an original product; that Masonite, as the owner of a basic patent, had a legal right to select its customers and to determine the prices at which it would sell hardboard to these customers through its own agents; that by the agreements between Masonite and the other Appellees a true agency relationship was created; that the agreement between Masonite and Celotex was made in good faith and with no illegal intent; that no combination or conspiracy ever existed between Masonite and Celotex or between either of these companies and any of the other Appellees.

The Court held also that Masonite had not in any respect misused any of its patents or violated any of the provisions of the Sherman Act.

STATEMENT

The Appellant's Statement of Facts completely ignores the decision, the findings and the conclusions of the Court below. Not only does the Appellant state as facts matters which it was unable to prove at the trial, but it states as facts matters which were disproved at the trial, and attempts to draw conclusions and inferences which have no basis in fact and which were rejected by the Court below after a complete trial and lengthy arguments on both sides. For this reason this Appellee rejects completely the Appellants' statement.

This brief is to be limited to a presentation of those aspects of the case which relate to the conduct of and affect the future existence of this Appellee. The Statement of Facts hereinafter set forth will be limited to transactions and matters involving this Appellee, and which are deemed essential in connection with any decision of this Court affecting this Appellee.

THE FACTS

I. The origin of The Celotex Company and its business.

The Celotex Company (to which this Appellee, The Celotex Corporation, is a successor upon reorganization under Section 77B of the Bankruptcy Act) was organized in 1920 by a small group of men of broad experience in various phases of the pulp and fibrous products industry (R. 640). These men envisaged a form of very light weight fibre insulation board for building construction, having qualities satisfactory for insulation against heat, cold and noise and at the same time structural qualities as great, or

greater, than natural wood (R. 640-641). Extended investigation and research resulted in a decision to manufacture this new insulation product with bagasse as the basic material. Bagasse is the waste material remaining after grinding sugar cane and extracting the juice therefrom. It had no value except as a low-grade fuel to be burned in the sugar plant boilers (R. 640). A plant was constructed by Celotex in 1920 at Marrero, Louisiana, just outside of New Orleans in the heart of the Louisiana sugar cane operations, which now represents an investment of over eight million dollars (R. 641).

The earliest product was a rough insulation board not comparable to the present product, but it was a new product of merit. It was light, durable, had structural strength and good insulating characteristics, and was the first acceptable product of its kind. The local lumber dealer had not handled materials of that character. It had no public acceptance and there was no channel through which it could be distributed (R. 641).

Through subsequent intensive research, advertising and promotional work The Celotex Company obtained widespread use and public acceptance of structural insulation board as a building material and procured its wide acceptance by the local lumber dealers (of which there are more than 20,000 throughout the United States) as a regular item in their inventories (R. 179, 180, 642).

Other companies, then engaged in the manufacture of entirely different building materials, soon entered the field. Numerous plants were built for the manufacture of insulation, most of them using wood as a raw material, until the business became one of the most highly competitive in the building material field (R. 642).

II. The entry of Celotex into the Hard Board Field.

As a result of long experimentation, shortly prior to 1929 The Celotex Company developed a process whereby it could produce out of bagasse a hard panel board having substantially the same uses and functions (as well as general appearance) as the hardboard products which had then been manufactured by Masonite for a few years (R. 643).

The raw material used by Masonite in manufacture of its hardboard was obtained from wood chips as distinguished from the bagasse used by Celotex. Celotex undertook manufacture of this hard panel board after independent patent counsel had rendered opinions indicating that such manufacture would not infringe existing patents, including those of Masonite (R. 643). Masonite had patents, including patent No. 1,663,505, claimed to be a basic material patent limited to the manufacture of its product from "woody materials". Celotex claimed there was nothing new in the Masonite art and also that bagasse was not a "woody material". Its new panel board product was placed upon the market in 1929 under the trade name of "Celotex Hard Panel Board". It had similar physical characteristics to hardboard and was capable of being used for most of the purposes for which Masonite hardboard was used, although it varied in quality and was admittedly of lighter weight and lesser strength (R. 180-181; Findings, Par. 9, R. 837). By this time, however, Celotex had found that in order to make good hard board, it should be made out of wood, or partly from wood and partly from bagasse (R. 575).

Masonite immediately threatened patent litigation with Celotex (R. 180, 874). Between May, 1929 and the early

part of 1931 The Celotex Company suggested that patent litigation be avoided by cross-licenses between Masonite and Celotex. Masonite refused to enter into such an arrangement (R. 181).

III. The Patent litigation and the Receivership of Celotex.

On April 2, 1931 Masonite instituted a suit against The Celotex Company in the United States District Court for the District of Delaware alleging infringement of Masonite Patent No. 1,663,505 and for an accounting of profits and for damages (R. 181; Findings, Par. 10, R. 874; R. 643).

The Celotex Company from the fall of 1929 until 1932 suffered a severe decline in demand for its products and sustained large operating losses. As a result of this and other causes, its affairs became so involved that in June, 1932, a creditor filed a complaint in the same court seeking the protection and preservation of the property, business and assets of the Company and the appointment of Receivers to take over and conduct its business and affairs (R. 181-182).

On June 16, 1932, the Honorable John P. Nields, presiding Judge in the District of Delaware, entered a decree appointing Colin C. Bell of Wilmington, Delaware and Hobart P. Young of Chicago, Illinois, Receivers of The Celotex Company and its property (R. 182; Ex. S-14). The decree of the Court directed the Receivers to carry on and conduct in all respects the business and affairs of the Company and enjoined the officers and directors from in any manner dealing with the property or carrying on any of the business of the Company. Ancillary proceedings were

immediately instituted in the District Court of the United States for the Northern District of Illinois, Eastern Division, and said Hobart P. Young was appointed ancillary receiver of the property of the Company located in that jurisdiction (R. 182).

The Masonite-Celotex patent litigation was also pending before Judge Nields who directed the Receivers to become parties to and assume the defense of the suit, and they thereafter had charge of the further defense thereof through counsel retained by them (R. 182; Ex. S-18, R. 209).

On October 19, 1932 Judge Nields rendered a decision holding that Masonite patent No. 1,663,505 was valid but limited to products made of natural wood fibre and therefore not infringed.* The decree dismissing the bill was entered on December 2, 1932. Masonite immediately appealed to the United States Circuit Court of Appeals for the Third Circuit. The Receivers, pursuant to order of the District Court, undertook the defense of the appeal (R. 183).

This patent litigation was bitterly contested, both in the District Court and in the Circuit Court of Appeals, and finally resulted in a decision by the Circuit Court of Appeals on July 6, 1933 holding two product claims and four process claims of Masonite patent No. 1,663,505 valid and infringed (*Masonite* v. *Celotex*, 66 F. 2d, 451; R. 183; Findings, Par. 10, R. 874). The Receivers applied for a rehearing which was denied on August 16, 1933 (R. 183). The Receivers thereupon filed in this Court a petition for a writ of certiorari (R. 183).

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*The decision of the District Court is reported in 1 Fed. Supp. 494.

There were no conflicting decisions among the circuits. The decision of the Circuit Court of Appeals rested almost entirely on its determination of two questions of fact: first, whether there was a prior art, and, second, whether bagasse was a "woody" material. Both of these issues were determined by that Court adversely to the contention of the Celotex Receivers and the last question adversely to Judge Nields' decision below.

IV. The Position of the Celotex Receivers after the patent case was finally determined.

From 1929 until the decision of the Circuit Court of Appeals, The Celotex Company and its Receivers had vigorously and successfully promoted the use and acceptance of "Celotex Hard Panel Board" (R. 643). New railroad tariff classifications had been obtained, pursuant to which hard board and structural insulation board could be combined in mixed carlot shipments (including pool car shipments), thus obtaining substantial savings in freight for any carlot shipper of hard board and insulation board combined, and also enabling dealers to obtain a diversified stock of hard board and insulation board products, with substantially less inventory and with resultant savings in dealers' capital outlay (R. 184).

After the decision of the Circuit Court of Appeals, the Receivers were faced with the loss of their hard panel board business and, as a consequence, with the loss of a large number of their customers who insisted upon continuing to purchase hard board and structural insulation in the same carlot shipments (R. 643).

Celotex had a large selling organization. It had about 200 to 250 salesmen and some 10,000 dealers accounts. It

was the only building material company that covered practically every county in the United States (R. 568). The hard panel board products manufactured by the Receivers were good products for building use but did not include products acceptable for industrial use by such industries as the furniture business and the automobile business (R. 570).

V. The Making of the 1933 Agency Agreement.

In the Fall of 1933, after the Circuit Court of Appeals had handed down its decision and rehearing had been denied, Mr. Gillies, then an official of Masonite, called upon Mr. Bror G. Dahlberg, then employed by the Receivers (R. 573). This was the first meeting between Masonite and the Receivers since October, 1932, immediately after the decision of the District Court in favor of the Celotex Receivers. Gillies said: "How would you like to have Masonite manufacture hardboard for you? In that way you can get what you want in the way of hardboard, and we can get the distribution which we need. We have to have mass production" (R. 573). Dahlberg replied: "That sounds interesting, but I don't quite understand what it is that you are talking about. What is the plan? So far as we are concerned we are going ahead with the prosecution of the suit. Mr. Young (a Receiver) has instructed the attorneys to file a writ or application for rehearing. If that is not granted he is going to file an application for a writ to the Supreme Court, and we don't think we are licked by an awful jugful" (R. 573). At this point (R. 573), the Court interrogated Mr. Dahlberg, as follows:

> "The Court: You were just whistling to keep your courage up?"

The Witness (Mr. Dahlberg): That is just about the situation."

Mr. Young had discussed the case with Dahlberg many times and always took the position that the chances of the Receivers were pretty slim, and that as a lawyer he would not give much for their chances on a writ of certiorari. Dahlberg however tried to impress Gillies with the idea that Masonite would not win in the Supreme Court and that there was no idea of the Celotex Receivers losing at all. He said to Gillies "If you have any plan, I will be glad to submit it but what becomes of the costs, and what becomes of an accounting?"* Gillies indicated that it might be handled so that Masonite would waive damages (R. 573).

Dahlberg said that he had to go to New York; that if Gillies could "stew up anything" they could let him have it or talk to Lutkin (attorney for the Receivers) or to Young (the Receiver), and that he would advise Young of what Gillies had said so he would be informed. There was no discussion of the details of that program or plan of Gillies, which Dahlberg characterized as "hazy" and "beclouded" (R. 574).

A week later Dahlberg returned to Chicago and was notified that Masonite had submitted an agreement to Lutkin, the Receivers' attorney. He was furnished a copy of the agreement by Young and Lutkin and discussed it with them and it was discussed by Young and Lutkin with other

*Gillies had made a statement which had been reported to the Receivers to the effect that when Masonite got through with Celotex they would own them "body and soul" because they could collect treble damages and would take all the remaining assets that the Receivers could possibly "spear out" (R. 573).

employees of the Receivers (R. 576-577). Young asked Dahlberg to put his suggestions and objections in writing, which he did and submitted a copy to Young and Lutkin, who were conducting the negotiations with Masonite (R. 577).

Although Appellant suggests that Dahlberg, employed by the Receivers, was possibly a "conspirator" or "guilty of collusion" in connection with the negotiation of the 1933 Agreement, the undisputed facts are that Dahlberg never knew what kind of an agreement was to be submitted by Masonite to the Receivers and only saw it after the Receiver, Young, and his counsel *brought it to* his attention (R. 574). He was opposed to any arrangement with Masonite except a manufacturer's license. His desire and the desire of The Celotex Company up to the time of the Receivership, and thereafter the desire of the Receivers, was for a license to manufacture. Dahlberg felt very strongly that the Receivers should not accept the agency arrangement and he succeeded in getting Young to delay signing the agreement in the hope that the Receivers could develop something in the way of manufacture to avoid the Masonite patent, because he was "not in favor of this cussed *del credere* business" (R. 588-589; R. 574). He told Young that Celotex, having spent years trying to build up manufacture and distribution, had plant facilities and raw material and should use them and "not simply become a peddler of other people's goods". He said that he hoped Young would not agree to the proposed *del credere* arrangement unless it became absolutely neccessary in his opinion as a lawyer and as Receiver (R. 589). Dahlberg kept resisting the *del credere* arrangement up to the last twenty-four hours hoping that in some manner they could

find out how to make a hard board themselves, or that Masonite would give them a manufacturing license (R. 589).

From the time of the decision of the Circuit Court of Appeals until the signing of the agreement with Masonite making Celotex its *del credere* agent, practically everyone in the Celotex research department devoted all of his time and attention in a frantic scramble to discover something that would clear the Receivers of this decision and permit them to continue the manufacture of a hard board product (R. 589; R. 645). Dahlberg spent days consulting with outside patent counsel, even retained new patent counsel in New York and Washington, but he got no comfort from anyone. The research department tried rice straw. They tried cooking. They tried the idea of introducing a different kind of glue or adhesive to substitute for the naturals lignins in the wood, but each of the products so produced was either non-commercial or was thought by patent counsel to be within the scope of the Masonite patent (R. 590; R. 644).

Mr. Young's instructions to Dahlberg were clearly "Do anything you want to; we are not going to get into another lawsuit on those patents, and we are not going to take a chance on an adverse decision that would make us pay a lot of damages" (R. 590). He told Dahlberg also that "he would not give much for our chances in the Supreme Court on a writ" (R. 573).

All efforts to produce a competitive product not within the scope of Masonite's adjudicated patent having failed, faced with possible heavy damages which were an operating charge on the Receivership, and faced with possible disruption of the established business through inability to sup-

ply customers with a hard board product for shipment in the same car with insulation board, the Receivers accepted the only course which remained open and determined to enter into the 1933 *del credere* agency agreement with Masonite. It was the only type of agreement they could make with Masonite for the distribution of hardboard products (R. 644).

Mr. Young, the ancillary receiver, thereupon applied to the District Court of the United States for the Northern District of Illinois, Eastern Division, the Receivership Court having charge of the ancillary proceedings, for the authorization of that Court. He presented a petition to which was annexed the 1933 Agreement in definitive form. (See Ex. S-19, R. 210.) The matter was presented to Judge Wilkerson, senior judge of that Court, who, being fully informed of the situation, entered an order directing his Receiver to enter into the 1933 Agreement (Exhibit S-19, R. 210). The Receivers then presented their petition to Judge Nields, who had charge of the primary receivership and who had had the patent litigation pending before him for a period of almost two years. After a hearing upon the petition, Judge Nields entered an order authorizing the Receivers to enter into an agreement of settlement of the litigation with Masonite, ratifying and confirming the order of the Illinois District Court and authorizing the Receivers to take the steps necessary to cause the petition for the writ of certiorari to be withdrawn (Ex. S-20, R. 211; R. 183). Pursuant to these orders the petition for certiorari was withdrawn on the joint consent of the Receivers and Masonite about October 10, 1933 and an order of dismissal thereof was entered by the Supreme Court on or about October 16, 1933. The order of dismissal is reported in 290 U. S. 708. The mandate of the

Circuit Court of Appeals for the Third Circuit was filed in the United States District Court for the District of Delaware on or about October 20, 1933 (R. 183-184). A copy of the final decree in said suit entered by the District Court of Delaware upon the said mandate on or about December 8, 1933 is Exhibit S-21, R. 211.

Pursuant to the orders of the two Courts, the Receivers entered into the 1933 agency agreement (Ex. S-23, R. 216, *et seq.*).

VI. Operation under the Agency Agreements.

The Celotex Receivers continued to act as agent under the 1933 agency agreement with Masonite and sold the hardboard products of Masonite thereunder until February 8, 1935. On that date, Judge Nields appointed temporary trustees of the estate under Section 77B of the Bankruptcy Act, and all of its property and assets were transferred to these temporary trustees. Judge Nields directed the temporary trustees to continue with the carrying out of the agreement (Ex. S-16; R. 652, 653). On March 1, 1935 "after due notice" and by order "made at a hearing" he confirmed the temporary trustees as permanent trustees with like directions (Ex. S-17; R. 653) and they assumed the 1933 agency agreement (R. 654) and carried out its terms.

On December 30, 1935, after hearings on a vigorously contested reorganization plan, Judge Nields confirmed a plan of reorganization for The Celotex Company, under the terms of which a newly formed corporation (the Appellee, The Celotex Corporation) acquired all assets and properties of the estate and was directed by Judge Nields to assume and perform all executory contracts and agreements

of the Receivers and the Trustees (Stip. Par. 34, R. 184; Ex. S-25; R. 654).

The carrying on by the Receivers and 77B Trustees of the manufacture and distribution of building products previously carried on by the old Celotex Company, including the distribution of hardboard for Masonite, proved highly successful (R. 644). The Receivers and Trustees and the new Celotex Corporation, during the early years of the agreement with Masonite, were in a large measure responsible for securing the widespread use and public acceptance of hardboard and establishing the local lumber yard and material supply dealer as the outlet for distribution of Masonite hardboard products to the ultimate consumer (R. 644). The other agents, Appellees herein, and Masonite itself have been able to capitalize on this promotional work and to increase the volume of sales of Masonite hardboard initiated by Celotex through the local lumber dealer and material supply dealer outlets (R. 644).

No representative of The Celotex Corporation or of the Receivers or Trustees of The Celotex Company ever conferred with any representative of Masonite as to any prices to be charged by Masonite or any agent of Masonite under the then existing agreement between Masonite and such agent and no representative of Masonite has ever asked the advice or consent of any representative of Celotex or of the Receivers or Trustees of The Celotex Company with reference to what would be a proper price at any time for any hardboard product of Masonite (R. 650).

Several controversies arose between Celotex and Masonite over the interpretation of the 1933 agency agreement. In 1936, Wallace (Vice-President of Masonite) stated to the President of Celotex that there had been sev-

eral misinterpretations of the 1933 Agreement and that numerous abuses had grown up concerning the pooling of shipments and pooled car and mixed car shipments, and that some of Masonite's agents seemed to be "operating at tangents from others", and asked if there was any objection to "putting down a minute contract" so there would be no necessity for "interpretations or squabbles—to put down in detail what the 1933 Agreement meant." He was advised that that could be accomplished by amendments and that Celotex had no objection (R. 579-580). This clarification took the form of a superseding agreement (the Agreement of 1936) which was not intended to and did not change the relationship created by the earlier agreements; it was for the most part concerned with such matters as pooling of shipments, pooled car and mixed car shipments and descriptions of the various classes of trade, as well as describing who were wholesalers, who were jobbers, who were dealers, etc. (R. 580, 583, 520-521; Findings, Par. 23, R. 878).

VII. Research and efforts from 1933 to 1941 to find a substitute for Masonite's patented product.

Efforts to work out a method by which the Receivers could manufacture a competitive hardboard product without infringing Masonite's patents, though unsuccessful, continued until the day before the decision on the petition of certiorari was expected to be made by this Court (R. 591; R. 643, 644). Following the execution of the 1933 agency agreement research or development work on so-called hard board products was not discontinued. On the contrary, from the date of the 1933 Agreement until the discharge of the trustees in bankruptcy in 1935, intensive research was

continued, and the new Celotex Corporation to date has continued both research and experimental work to produce a hard board product which could be both manufactured and sold by the organization (R. 645, 648-649).

It has continued at all times to be the policy of the Celotex organization to resume the manufacture of hard board products when it has the ability to do so without conflicting with the Masonite patent structure and can produce a satisfactory type of material competitive with Masonite patented products. In line with this policy, continuously since its organization Celotex has not only labored intensively on methods of manufacture which it has developed itself, but has investigated various processes which were brought to its attention by others in the United States or in foreign countries, in an effort to produce a product it could manufacture and distribute (R. 646). For a detailed and comprehensive statement of these efforts see record pages 646, 647, 648.

The Celotex organization was successful in manufacturing a board that was hard, but it did not have the qualities which would make it competitive. Independent chemists and engineers were employed to help. On several occasions Celotex has been convinced that it had the problem solved and has been about to notify Masonite of the cancelation of the contract, but each time patent counsel has advised against such a course. Even at the time the herein was in progress, an independent engineer was serving the company, whose duty was to investigate and work on a new theory (R. 591-592; R. 648, 649).

In 1937 The Celotex Corporation established a large plant in England, where, due to the English patent laws,

Masonite's patent could not prevent the manufacture of hardboard by Celotex (R. 587). In the English plant extensive research has been carried on in a practical way in an effort to develop the hard board product manufactured there along lines which might avoid in the United States the terms of the injunction against Celotex entered in the Masonite patent suit, but without success (R. 648).

Despite the fact that Masonite has made available its hardboard products for sale by Celotex in foreign countries, Celotex has continued manufacture of hard board in its English plant and has made sales in every foreign country where possible to do so without infringing Masonite's valid foreign patents. During the past two years the English plant has been operated solely for the British government producing Celotex products for war use.

VIII. Intention of Celotex to continue its research efforts.

It is the intention of Celotex to continue active development, research and experimental work in an effort to produce satisfactory hard board products fully competitive with Masonite's patented hardboard and it is the intention of Celotex to cancel its existing agreement with Masonite prior to 1945 in the event that it is able to find a way to manufacture hard board products without the scope of the Masonite patent (R. 648-649).

In any event it is the hope of The Celotex Corporation to find a way to procure facilities which will permit it to engage in the business of manufacturing its own hard board products and to distribute such products as products of its own company in full and active competition with the Mason-

ite Corporation after 1945 upon the expiration of the Masonite patent (R. 649).

IX, Necessity of continuing the agency.

The continuance of the agency relationship with Masonite has been motivated solely by the absolute necessity that Celotex be afforded a source of supply of hard board with which to satisfy the needs and demands of the customers whom it has served for so many years (R. 649) and who could not be expected to continue to purchase insulation products from Celotex unless they can acquire hard board products in the same carload shipments with insulation products, particularly while such advantages are offered by Masonite (R. 678; R. 594, 595; R. 499).

For some time the plants of Celotex have been operating on a twenty-four hour a day basis and in excess of their rated capacities in an effort to supply insulation materials required in the National Defense Program, and Celotex has had to curtail supplying the full requirements of its regular customers. Consequently, it does not now have the facilities capable of manufacturing hard board products, were it free from the limitations of the injunction which prevent it from engaging in such manufacture (R. 649). The construction of its plants and facilities to manufacture hard board products, could it legally engage therein, would not only require the expenditure of large sums but in view of the present shortages of materials and manufacturing facilities to supply the machinery required would entail a delay of two to three years before the construction of such plant and the installation of the necessary machinery

could be completed; if at all.* By this time, most of the Masonite patents will have expired (R. 649).

X. The 1941 Agency Agreement.

During the investigation carried on by the Department of Justice which resulted in the institution of this action and also after the complaint was filed, Celotex endeavored to ascertain from the Department of Justice what was the basis of the complaint so far as the agency agreement between it and Masonite was concerned (R. 584). In an effort to find some solution of the situation, counsel suggested the revision of the 1936 Agreement so as to eliminate from that agreement provisions which had been criticized by the Department of Justice (R. 584).

These efforts resulted in the making of the 1941 Agreement. The 1941 Agreement met every material criticism leveled by the Department of Justice at the provisions of the earlier agreements, except that Masonite, first, still retained the right to direct its agents concerning the price at which they should sell Masonite's patented product and, second, withheld from its agents the right to sell hardboard to industrial customers. At the trial, counsel for the Appellant conceded that the only objection which the Government then

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*This Court will take judicial notice of the well known fact that since this case was tried the war effort has resulted in "priorities" preventing procurement of machinery, equipment and most materials and that the ability of Celotex to construct hard board manufacturing facilities in the event of its developing a non-infringing product would consequently be difficult, if not impossible, while the war lasts. *Ashwander* v. *Valley Authority*, 297 U. S. 288, 327 (1936); *Watts, Watts & Co.* v. *Unione Austriaca, &c.*, 248 U. S. 9, 22 (1918); *Louisville Bridge Company* v. *United States*, 242 U. S. 409, 416-17 (1917).

had to the 1941 Agreement was that Masonite still told its agents at what price they could sell Masonite's hardboard (R. 749).

Celotex has fully observed the terms and provisions of the 1941 Agreement, expects to continue to do so and has no intention of reinstating any of the pre-existing agreements which were cancelled by the 1941 Agreement (R. 651).

ARGUMENT

SUMMARY OF ARGUMENT

The bill of complaint charges that the original agency agreement was entered into pursuant to a conspiracy between Masonite and Celotex and that the other defendants later joined the original conspiracy by subsequently entering into agency agreements with Masonite.

The validity of the agency agreements under the Sherman Act is adequately treated in the brief filed by appellee Masonite Corporation. To avoid repetition the points argued in the Masonite brief will not be treated here.

This brief is directed primarily to the point that the evidence sustains the finding of the trial court that there never was any conspiracy between Masonite and Celotex and there could not have been any.

It is submitted that:

1. The 1933 agency agreement was made pursuant to the authority of two United States District Courts by the Receivers of The Celotex Company, the assets of which were subsequently acquired by this Appellee, The Celotex

Corporation. This Appellee merely succeeded to the rights and obligations of the Celotex Receivers, pursuant to court order which directed it to assume and carry out the agreement. The facts and circumstances surrounding the making of this agreement completely refute the Appellant's charge that the agreement was the result of an illegal conspiracy or combination in violation of the Sherman Act. Price fixing could not possibly have been a motive of the Celotex Receivers in making the agreement.

2. Since no conspiracy or combination was made or could have existed in 1933, the making of the 1936 agreements could not have been, as the Government contends, in furtherance of such conspiracy. The 1941 agreements were made for the proper purpose of removing any basis of controversy with the Anti-trust Division of the Department of Justice, and are valid agreements found by the Trial Court to have been made in good faith, for a lawful purpose and with a lawful effect, and to represent the exclusive understanding between Masonite and its agents at the time of the trial.

3. The principle and relief for which the Appellant contends would result in a gross injustice to this Appellee by destroying its well earned right to continue in the business of selling hardboard and insulation board, would concentrate an absolute monopoly in Masonite and enable it largely to take over the business of The Celotex Corporation and the other agents in other fields of the building industry, would tend to increase prices, limit distribution and otherwise adversely affect the building industry, and would be generally detrimental to the public interest.

POINT I

THE APPELLANT WHOLLY FAILED TO PROVE ANY CONSPIRACY BETWEEN MASONITE AND CELOTEX IN ENTERING INTO THE ORIGINAL AGENCY AGREEMENT; ON THE CONTRARY, IT HAS BEEN CONCLUSIVELY DEMONSTRATED THAT SUCH A CONSPIRACY WAS IMPOSSIBLE.

1. The evidence conclusively establishes that the agency agreement was not entered into pursuant to any conspiracy between Masonite and Celotex and therefore that none of the defendants could have joined any conspiracy by subsequently entering into agency contracts with Masonite.

The Bill of Complaint is based upon the charge that on October 10, 1933 the defendants, Masonite and Celotex, conspired unlawfully to monopolize and restrain trade in hardboard and products in competition with hardboard in violation of Sections 1 and 2 of the Sherman Act and that subsequently the other defendants "from time to time joined the unlawful conspiracy" (Pars. 37, 38, R. 8).

The Celotex Corporation was not even in existence on October 10, 1933. An earlier company, The Celotex Company, had, long prior to that date, been placed in receivership and was still in receivership. It is elementary that it requires two to make a conspiracy.* The agreement, which the Government states is the foundation of the conspiracy charged in the complaint, was entered into "by

*A conspiracy is a combination of two or more persons to accomplish, by concerted action, criminal or unlawful purposes, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. (*Pettibone* v. *U. S.*, 148 U. S. 197, 203 (1893).)

Hobart P. Young, duly appointed Receiver of The Celotex Company, acting as such Receiver and not personally" (Exs. S-23 and S-24, R. 216, 232), pursuant to the orders of two United States District Courts who were fully acquainted with all of the facts.

Neither the old Celotex Company nor the new company, formed many years afterward (this Appellee) had anything to do with the negotiation or execution of that agreement. Prior to the execution of the agreement, Mr. Young as Receiver filed a petition with the District Court of the United States for the Northern District of Illinois, Eastern Division setting forth the facts and circumstances in connection with the negotiation of that agreement, to which had been attached a complete copy of the proposed agreement. A hearing was had upon that petition and the Receiver was authorized to enter into the agreement. Similarly the two Receivers appointed by the District Court of the United States in Delaware filed a petition before that Court and secured the approval and authorization of that Court to the execution of the agreement (Ex. S-20, R. 211; R. 183).

The agreement was thus "the contract of the court" (*American Bonding & Trust Co.* v. *Baltimore & O. S. W. R. Co.*, 124 Fed. 866, 877 [C. C. A. 6, 1903]). Can it be doubted that Judge Nields, having heard the protracted and bitter patent case, having rendered a decision in that important case and having been reversed by a divided court, having directed the affairs of the Celotex business during the same period, "maturely" considered the settlement and the agreement, as his order recites? Only his sincere belief that his Receivers were acting in the utmost good faith and making the best arrangement possible

under the circumstances could have led him to approve of a settlement that made the Receivers mere agents for the sale of Masonite hardboard, subject to Masonite's directions as to the price at which and the class of customers to which its product should be sold.

Mr. Young was a lawyer who quite obviously had the confidence of the two District Courts who appointed him as their representative to carry on and to operate the business and properties taken into the custody of those Courts. The charge that this agreement of the Receiver, so authorized and approved by the two Federal Courts having full knowledge of the facts, constituted a conspiracy, comes at a time when each of the Receivers is dead and each of the Judges who presided over those Courts and entered those orders has retired. The question of the application of the statute "is one of intent and effect", and while good intentions will not save a plan otherwise objectionable, nevertheless "knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences". *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 361, 372. The issue of intent and good faith is therefore of transcendent importance in the case at bar as an aid in the interpretation of the facts and a determination of the question whether the agency agreement of 1933 was, as the Appellant contends, entered into for the express and avowed purpose of circumventing the antitrust laws by the creation of a simulated relationship, or whether it was entered into in good faith with the intent and effect of creating a true agency relationship within the principles established in the *General Electric* case. The circumstances under which the original agreement was entered into clearly disprove the appellant's charge of combination and conspiracy.

We submit that, under the circumstances shown to have existed when the agreement was signed, a conspiracy to violate the anti-trust laws was impossible.

2. The Appellant's attempt to construct a "combination" composed of Masonite and the agents has failed.

In the Bill of Complaint the charge of conspiracy is both definite and specific. It is there charged that Masonite and Celotex entered into an unlawful conspiracy on October 10, 1933 which was subsequently joined in by the other defendants (R. 8). Appellant's counsel adhered to this theory in his opening (R. 432-3). But apparently the Appellant was as profoundly impressed as was the Trial Court with the fact that the circumstances surrounding the execution of the 1933 agency agreement were utterly lacking in the basic requisites of a conspiracy. This is evidenced by the fact that the word "conspiracy", used so freely in the Bill of Complaint, is noticeably and significantly omitted from the Appellant's brief in this Court. On the conspiracy issue the Appellant proceeded at the trial " to * * * trim his sails to shift his course when the wind of defeat began to rise".*

In its brief in this Court the charges against the Appellees are no longer definite and specific; on the contrary, they are pleasantly vague and indefinite. All of the Appellees are asserted to have joined in a "combination" achieved by "joint action" (Brief, pp. 60-1). The asserted effects of this "combination" are thoroughly discussed, but there are no specifications as to the date, place or circumstances of its formation. Apparently the Appellant has now receded to the position that a combination has been established be-

*Pound, *J.* in *Matter of A. E. Fire Ins. Co.* v. *N. J. Ins. Co.*, 240 N. Y. 398, 407 (1925).

cause each of the Appellees "knew that its contract with Masonite was not an isolated transaction, but a part of a larger scheme". It admits in its brief (pp. 73-4) that "There may be room for debate as to the exact point of time at which some of the appellees became aware of this circumstance and as to the precise extent of their knowledge at the moment when they signed contracts with Masonite". But there can be no doubt, argues the Government, that "each of the 'agents' became familiar in detail with its purpose and scope".

Undoubtedly, this theory has been evolved in an effort to bring the facts of this case within the decision of this Court in *Interstate Circuit v. U. S.*, 306 U. S. 208 (1938). But it is manifest, we submit, that that case is wholly inapposite. There, each of the alleged conspirators knew of the plan, knew that concerted action was contemplated and invited and gave his adherence to the scheme and participated in it. Moreover, as the Court explained (pp. 226-7):

> "Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce * * * and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined."

We submit that, applying this test, under the facts and circumstances shown to have existed in the case at bar when the agreement was signed, a conspiracy to violate the anti-trust laws was impossible.

The Appellant proceeds in its brief as though it were a settled fact that the Celotex Receivers entered into the

1933 agency agreement with Masonite upon the assumption or agreement that the other Appellees were to enter into similar agreements. This is contrary to the undisputed facts.

It is perfectly clear, and the Court below found (Finding, Par. 15, R. 875), that there was no understanding with Masonite that it would make any other agreement with any other concern or concerns to distribute or market its hardboard, and that there was no expectation or desire on the part of the Receivers or their representatives that Masonite would or should do so.

The only conference that preceded the tender by Masonite to the Celotex Receivers of the agency agreement was a meeting between Mr. Gillies, representing Masonite Corporation, and Mr. Dahlberg, then employed by the Receivers. Mr. Dahlberg testified that none of these other companies was mentioned; that Mr. Gillies never said anything about executing an agreement with any other company and that, on the contrary, he believed from Gillies' representations that it was just going to be a deal between Masonite and the Celotex Receivers and that no one else was to get an agency contract of that kind (R. 578). The Receivers had every reason to hope that this would be the situation.

Neither the Receivers nor any of their representatives had any expectation or thought at the time of the execution of the 1933 Agreement or prior thereto that an agreement of that character or any arrangement for the distribution of Masonite hardboard would be entered into between Masonite and any of the other Appellees in this cause (R. 593). The other Appellees were never mentioned by Masonite in the negotiations and nothing was said about Masonite's executing a similar agency agree-

ment with any other company (R. 578). On the contrary, Masonite represented that it was going to be a deal solely between the Celotex Receivers and Masonite. Dahlberg believed at the time that no other concern was to get an agency contract. It was not until after the execution of the Masonite-Celotex Agreement of October 10, 1933, that the Receivers or their representatives learned of the negotiations on the part of Masonite with other companies (R. 578; R. 592-593).

Apparently, the sole basis for the Appellant's charge that a combination was formed in 1933 is that some of the agents knew when they signed the first agreements with Masonite that it had either executed or proposed to execute the same or similar agreements with other companies (Appellant's Brief, footnote pp. 73-4). It was quite natural that the agents should have had such knowledge. Indeed, immediately upon the signing of the 1933 Agreement by the Receivers, they caused notice to be given to all of their customers and all other distributing outlets of the results of the patent litigation, and of the fact that arrangements had been worked out whereby the Celotex organization would distribute Masonite's hardboard products (R. 638). Naturally, the entire building industry, including the persons who later became agents, received this information almost simultaneously and were in a position to seek, as they apparently did, some arrangements with Masonite whereby each might be enabled to include hardboard in its line of building products.

Masonite having won the litigation, was in a position to determine upon what terms, if any, it was willing to permit others to sell its hardboard. Each of the agents was obliged to make an agreement on the only basis that Mason-

ite offered. Each of the subsequent agency agreements was made without communication with any other agent (R. 877). There is no evidence that a "scheme" or "plan" was proposed by anyone and certainly no agent was asked to participate in any plan, as in the *Interstate Circuit* case.

In that case the Court pointed out that each distributor knew that cooperation was essential to the successful operation of the plan. That important element is utterly lacking here, even assuming *arguendo* the existence of a plan. In the case at bar not only was cooperation by all not essential, but each agent, beginning with the Celotex Receivers, had reason to hope that other companies would *not be permitted* to secure the right to distribute Masonite hardboard.

Another of the essential elements referred to in the *Interstate Circuit* case is lacking. There the Court said that the distributors knew that the "plan, if carried out, would result in a restraint of commerce". How could any agent have known that fact in the case at bar? In this case no restraint of trade was in contemplation. Celotex had under consideration merely the making of an agreement which would enable it to remain in the hard board business, notwithstanding the injunction in the patent case. Masonite was going to permit Celotex to sell as its agent. The legality of the agreement seemed fully sustained by applicable decisions of this Court. The right of Masonite, as the owner of a basic patent, to fix the price and terms of sale under which its product was to be sold in the open market had been established by the unanimous decision of this Court in the *General Electric* case. And another important power which Masonite refused to give to the agents, namely, the right to sell in the industrial field, had always been recognized as legal and has since been confirmed by a

decision of this Court (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, aff'd on reargument 305 U. S. 124 [1938]). The suggestion of the Appellant in its brief (footnote, p. 75) that the members of the "combination" had delegated "to one of its members the power to fix a price that all members observe" is without the slightest support in the record.

In the *Interstate Circuit* case the court said (p. 226):

> "The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."

In that respect also the situation in the case at bar is vastly different from that involved in the *Interstate Circuit* case. In the case at bar those "who are in a position to know" were called and testified either in open court or by stipulation, without contradiction by the Appellant, that the charges of conspiracy and combination were without the slightest foundation.*

*For example, it was stipulated that a representative of Certain-teed Products Corporation, who was familiar with the transactions, if called would have testified in substance that his company had not imposed as a condition to the making or continuation of the first agreements that the same or similar agreements would be made with other distributors of building materials; that it was not motivated in making any of the agreements by the hope that Masonite would enter into the same or similar agreements with any other concern; that no representative of Masonite ever stated to him that Masonite's willing-

The evidence so adduced was not "weak" evidence; it was strong and direct; and it was uncontradicted.

Perceiving the weakness in its original theory of the formation of the conspiracy, the Appellant seems to take comfort from the fact that in making the 1936 Agreements (which, as we have explained, were made necessary by technical disputes arising from operations under the 1933 Agreements) Masonite insisted that they be deposited in escrow until all of the agreements had been signed. This action, it is asserted, is evidence of combination. But, as the Appellant well knows, this argument conveniently ignores the significant fact that by reason of the so-called "most favored nation's clause" in the 1933 Agreements,

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ness to enter the first agreements was conditioned upon the hope or expectation that it would be able to make the same or similar agreements with any other entity; that no representative of his company prior to the execution of the first agreements had any discussion with any representative of any other agent who had theretofore or thereafter entered into a similar agreement with Masonite concerning any of the terms of such similar agreements or as to whether or not any such agent was carrying on negotiations with respect to such an agreement with Masonite; that his company had not had any understanding, arrangement or agreement with any other defendant who entered into an agreement with Masonite; that his company had had no purpose in making the agreement other than securing the right to distribute hardboard; that his company had not suggested or required the insertion in any of the agreements of any provision for the fixing of prices or the limiting of the classes of customers to which either might distribute hardboard; that no representative of his company had ever conferred with a representative of Masonite as to the prices to be set by Masonite and that no representative had ever asked the advice or consent of any representative of his company with reference to what would be a proper price for any hardboard products of Masonite (R. 669). There is ample testimony to the same effect by qualified officers and representatives of other agents (R. 627; R. 630-631; R. 633; R. 634-635; R. 650; R. 659).

Masonite was required for its own protection to escrow the 1936 superseding agreements until all had been signed. Thus explained, the escrow arrangement does not advance the Appellant's argument in the slightest degree.

3. Price fixing was never a motive on the part of Celotex in entering into the 1933 Agreement.

The Appellant seeks to create an impression that the Celotex Receivers wished to set up some price control program in the hard board industry. Lacking any basis in the record, Appellant refers in its brief to a letter from one Gillies, of Masonite, to Mason, dated October 31, 1932, a year prior to the 1933 Agreement. This letter was refused admission in evidence, a fact which can be discovered only by a footnote in the Appellant's brief. The Appellant quotes Gillies as stating in the letter that "Dahlberg's whole attitude seemed to be that he was perfectly willing to do anything which was constructive in setting up some kind of an establishment which could license and control the price situation".

The letter is a report on a meeting which Gillies sought with Dahlberg in 1932, after the Celotex Receivers had won the patent case in the District Court. The statement was admittedly only an "impression", and nothing in the record substantiates that impression.

The Appellant called Dahlberg as a witness and interrogated him at length about this meeting with Gillies, at which many other people were present. Dahlberg's version of his conversation and of his attitude about the matters discussed at that conference is wholly inconsistent with Gillies' attempted characterization of Dahlberg's attitude. On cross-examination he was asked directly concerning

his attitude about fixing prices for hard board and he testified that he had never desired to be a party to an arrangement which would fix prices at which hard board was sold. It is plain, we submit, that Gillies was either mistaken in his interpretation of Dahlberg's attitude, or deliberately contrived an erroneous interpretation in an effort to brighten up the situation for the benefit of his superiors who had just lost the patent case.

The Gillies conversation meeting was not attended by the Receivers, and so far as the record discloses the Receivers had no knowledge of it. It took place a year prior to the execution of the agency agreement, and was concerned with an exploratory suggestion about a settlement by cross-licensing. Lacking any basis for showing that the Receivers had a desire to set up a price fixing arrangement when they had accepted the agency agreement in the fall of 1933, the Appellant seeks to imply the *non sequitur* that Gillies' characterization of Dahlberg's attitude in this conference over a year before is some indication that a year later Dahlberg wanted an agency arrangement as a price fixing device and induced the Receivers to embrace these views.

The undisputed facts are that Dahlberg opposed the agency agreement or any arrangement that placed Masonite in a position to "sit down and tell us how to run our business" (R. 594); he succeeded in getting Young to delay signing the agreement in the hope that the Receiver could avoid being forced to do so and could continue to manufacture some competing product, because, as he says: "I was not personally in favor of this cussed *del credere* business" (R. 589). Dahlberg told Young that he opposed it in principle; that they had been trying for a

number of years and by the expenditure of a great deal of energy to build up the manufacturing and distribution business in the material supply field; they had a plant, facilities and raw material and should use them and not "become simply a peddler of other people's goods". He told Young he hoped he would not agree to the *del credere* arrangement unless it became absolutely necessary in his opinion as a lawyer and as a Receiver (R. 589).

The Appellant seems to derive considerable comfort from the fact that Celotex was "interested in the price question" (Brief, p. 16). Dahlberg is asserted to have been interested in a formula that "would require Masonite to adhere to the same prices for hardboard that were charged by Celotex" (Brief, p. 17). The fact that Celotex was "interested" in the price of hard board does not mean that it was interested in an arrangement with Masonite to fix or control the price. Celotex had been compelled, against its will, to accede to the legal right of Masonite as the owner of a basic patent to determine the prices at which the patented product would be sold in the open market. Naturally, Celotex was interested in the price so to be determined because it vitally affected the ability of Celotex to compete with Masonite.

Dahlberg's attitude is shown by the following quotation from his testimony (R. 576):

> "Q. (By Mr. Cox) A moment ago you said that you wanted to make sure that the price was really a competitive price. Will you explain to us what you meant by this? A. (By Mr. Dahlberg) Yes. I did not want Masonite to instruct us to sell for $32, when they were selling for $31, neither did I want Masonite to say, 'Your terms were thirty days and ours were sixty days.'

Q. You wanted to be sure they were selling at the same price and conditions? A. I wanted to be sure that we could sell at as favorable a price as they were."

We submit that the interest of Celotex in the price to be fixed by Masonite, as evidenced by this quotation from Dahlberg's testimony, was a perfectly proper and natural interest under the circumstances and has no sinister or illegal connotation whatsoever.

Dahlberg testified that his final acquiescence as an employee of the Receivers in their decision to enter into the October 10, 1933 Agreement was not motivated by a desire to enter into any agreement or arrangement which would provide for the fixing of prices; that all he wanted was hard board products for their dealer customers; that he never asked Masonite or any of its representatives or any of the other companies who later became *del credere* agents, or any of their representatives, to enter into any agreement with the Celotex Receivers or anyone else for the purpose of controlling prices on hard board (R. 592-593); that he did not like nor did the Receivers like to have Masonite exercise its right to determine the prices.

The Appellant argues that the fact that Masonite agreed with its agents to adhere to the prices set by it is evidence of an intent by the parties to enter into a price-fixing agreement.

It is inherent in any agency relationship that the principal will not directly undersell his own agent. It requires no argument to demonstrate that if Masonite were to fix a specified price as the only price at which its goods may be sold by the efforts of its agents and then should directly undersell such agents, the agency would immedi-

ately collapse. It was expected that these agents would devote time and effort and undertake great expense in promoting the widespread public acceptance and consumption of Masonite's patented hardboard. The ordinary rules of common honesty, which the Antitrust Laws were never designed to transcend, would not permit Masonite to accept these benefits and then, at an advantageous time, destroy the agency by fixing one price for its agents and a lower price at which it would itself sell directly to the same customers.

Quite aside from any question of moral duty on the part of Masonite, can there be any doubt that under Section 2 of the Clayton Act (the Robinson-Patman Act amendment), it would be unlawful for Masonite to sell its hardboard products directly to dealers at lower prices than those at which its agents sold such products to the same classes of dealers? The covenant prohibiting such a violation cannot by any stretch of the imagination be in violation of the Sherman Act.

The 1933 Agreement was the best arrangement the Receivers could negotiate with Masonite (R. 594). So far as the Receivers or their representatives were concerned, it is clear that they were not motivated by any desire to have prices fixed (R. 592). In accepting the agency arrangement, the Celotex Receivers merely acquiesced, because they were forced so to do, in the exercise by Masonite of its legal right to deal with its own goods as it saw fit.

The finding of the District Court that the agreements were not entered into for the purpose of fixing prices or restraining or monopolizing trade (Findings 22 and 24, R. 878) is fully supported by the record.

4. The evidence clearly shows that the sole purpose of the Celotex Receivers in entering into the agency agreement of 1933 was to secure the right to sell the patented product, hardboard, which they were prevented from manufacturing or distributing by a final decision of the Circuit Court of Appeals.

The continuous efforts of the Receivers, the Trustees and the new Celotex Corporation to find a way to manufacture a competitive product outside the scope of Masonite's patent is shown in the Statement of Facts and in the parts of the record which are referred to therein (Statement of Facts, pp. 17-20). These efforts (which are still continuing) completely negative the purposes attributed to Celotex by the Appellant.

The allegations of the purposes and effects of the alleged conspiracy are set forth in Paragraphs 41 and 47 of the Bill of Complaint (R. 9, 10). Among the purposes and effects stressed by the Appellant are: (1) "the elimination of further price competition on hardboard between Masonite and Celotex"; (2) "Discontinuance by Celotex of the production of hardboard or products competitive with hardboard"; (3) "the restriction of Celotex's sales of hardboard to the building trade, thereby eliminating competition by Celotex in non-building industries"; (4) "an increase in Masonite's volume of production through the utilization of Celotex's extensive selling organization for increased distribution"; and (5) "increased profits to Masonite and Celotex".

As we have shown, the elimination of price competition was not one of the purposes of Celotex in entering into the agreement with Masonite. The decision against Celotex in the patent litigation eliminated all competition and

Masonite, in the exercise of its legal rights, determined to set the prices at which its products should be sold by its agent in the open market. Similarly, the restriction of Celotex sales of hard board to the building trade, thereby eliminating competition by Celotex in the non-building industry, was not a result which Celotex desired to achieve. A conspiracy by the Celotex Receivers to accomplish that purpose would have been ill-advised, indeed. That provision in the contract also was imposed by Masonite pursuant to its legal rights under the decisions of this court (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, aff'd. on reargument, 305 U. S. 124 (1938)).

The remaining alleged purpose and effect was to "avoid the possibility of a final determination by the Supreme Court in the Masonite patent case".

In its brief the Government asserts that "Masonite was aware that there were reasons for avoiding an ultimate test of the validity and scope of its patents" (p. 12) and "was informed that Celotex was confident of the soundness of its attack on the validity and scope of Masonite's patents and was prepared to carry the attack to the Supreme Court unless the controversy could be settled" (p. 13). These statements are, we submit, without the slightest support in the evidence.

In the course of his summation, Government counsel at the trial said concerning this patent litigation and the petition for writ of certiorari:

> "Mr. Cox: There is no question that the litigation was bitter, and there is no suggestion that the patent litigation was collusive. * * *" (R. 727).

The petition for writ of certiorari was based solely upon the theory that since the decision of the Circuit Court of

Appeals was a two to one decision overruling Judge Nields' decision in the District Court, two Judges of the Circuit Court of Appeals had decided one way and one Judge of the Circuit Court of Appeals and one District Judge had decided contrarily; that there was thus an equal division in the views of Judges and, therefore, that this Court should review the decision of the Circuit Court of Appeals. This was despite the fact that only a question of fact was involved, namely, whether bagasse, the waste material resulting from the manufacture of sugar cane, was a "woody" material. Mr. Young, the Receiver who was a lawyer, had finally to pass upon the question whether the petition for a writ of certiorari should be pressed by counsel for the Receivers as an alternative of the settlement proposed. He advised that "he would not give much for our chances in the Supreme Court on a writ" (R. 573).

The Government stresses in its brief a comment by Mr. Dahlberg, employed by the Receivers, to Mr. Gillies to the effect that "we don't think we are licked by an awful jugful", and that he tried to impress Gillies with the idea that it was a 1,000 to 1 chance that he (Gillies) might win in the Supreme Court. Interrogated by the Trial Court, Dahlberg admitted that he and the Celotex Receivers were just whistling to keep their courage up (R. 573). It likewise appears that Gillies was unimpressed for he stated that they never took the petition for the writ of certiorari seriously and regarded it as having only one chance in a million of being granted (R. 486-487).

The complete lack of cooperation on the part of the Celotex Receivers in trying to avoid the invalidation of the Masonite patents by the Supreme Court is best illustrated by the fact that between the date of the decision of

the Circuit Court of Appeals and the execution of the agency agreement (which took place the day before the decision of the Supreme Court with respect to the petition for writ of certiorari) the Celotex Receivers had their entire research staff at work in trying to devise some product outside the scope of the Masonite patents and delayed signing the *del credere* agency arrangement until they were without hope of doing so without taking the risk that the writ of certiorari would be passed upon adversely by this Court before the agreement was signed. This delay continued until the day before the decision of the Supreme Court was expected; the day when, as Dahlberg characterized it, "the world was going to blow up".

POINT II

THE CHARGE OF THE APPELLANT THAT THE AGENCY AGREEMENT SUPPRESSES TRADE AND COMMERCE BY STIFLING RESEARCH AND INITIATIVE BY THE AGENTS IN DEVELOPING AND MARKETING NEW PRODUCTS COMPETITIVE WITH MASONITE HARDBOARD IS UNFOUNDED AND HAS BEEN DISPROVEN.

The Statement of Facts herein (pp. 17-20) shows that the Receivers of Celotex, after the decision of the Circuit Court of Appeals holding them infringers of Masonite's patent, made intensive efforts to develop a fully competitive product in an effort to avoid the impact of that decision. Failing in this and obliged to become Masonite's agent, they insisted upon a short cancellation clause so as to be free of the arrangement if and when their continued efforts were rewarded with success.

The Statement of Facts (pp. 17-20) and the record citations therein set forth show conclusively (and it is undisputed) that ever since the execution of the 1933 Agreement, the Celotex Receivers, the 77B Trustees and the new Celotex Corporation have continuously, for a period of eight years, carried on extensive research, both here and abroad, and have made numerous, intensive investigations to develop products competitive with Masonite patented hardboard outside the scope of its patent. Not only the research departments of Celotex here and abroad have been continuously and intensively so engaged, but outside experts have been retained to develop every lead which had the slightest hope of success. In the stipulation of facts (R. 648-649), following a detailed recital of this continuous, intensive and costly research and promotional work to find a substitute outside the Masonite patent, it is shown that since 1933 the Celotex organization has at all times been desirous of manufacturing its own hard board products and distributing the same as products of its own manufacture; that it is the policy and intention of the company to continue active development and research and experimental work in an effort to produce satisfactory hard board products competitive with Masonite patented hardboard and its intention to cancel its existing agreement with Masonite prior to 1945, in the event that prior to that time it is able to find a way to manufacture hard board products without the scope of the Masonite patent; and that in any event it is the intention of The Celotex Corporation to re-engage in the business of manufacture of its own hard board products and to distribute the same as products of its own manufacture in active competition with Masonite after 1945, the expiration date of the Masonite patents and the injunction against Celotex.

Since the execution of the 1933 Agreement, Celotex, in an effort to meet increased competition for service, warehousing and economies in distribution, has gradually broadened its line to include all the items shown in Exhibit S-2 of the Stipulation of Facts (R. 202). Most of these products are now manufactured by The Celotex Corporation, directly or indirectly, in the plants of The Celotex Corporation or in those of associated or affiliated companies. These products include most of the substitutes for hardboard (R. 179) which are reasonably capable of being manufactured or distributed by companies engaged in the business in which Celotex is engaged.

Celotex has not been the only agent to pursue such a course. Practically every other agent is shown by the record to have pursued such a course and to have similar intentions for the future (Ex. S-3 through Ex. S-10, R. 202-206).

In the face of the undisputed facts as shown by the record, the charge of the Appellant that the effect of the agency has been to suppress research and development and the marketing of competitive products is unfounded.

POINT III

THE GRANTING BY THIS COURT OF THE RELIEF SOUGHT IN THE BILL WOULD CREATE A MONOPOLY AND ELIMINATE ALL COMPETITION IN THE SALE OF HARDBOARD.

In 1933, when the agency agreement was entered into between Masonite and the Receivers of Celotex, the situation of Masonite was desperate. Its cash was depleted; it was heavily indebted; its receivables were pledged; and it

had borrowed money to meet its pay rolls upon the indorsement of its directors. It had expended over $150,000 in the patent litigation to establish the validity of its patent position, and its mills were operating only intermittently (R. 672-4).*

Masonite had a meagre sales organization and it had been unable to establish distribution of its products through the local lumber yard and material supply dealers. Even where it had been able to secure a few local dealers, they had demanded exclusive representation in their respective communities. The public generally had little knowledge of Masonite products or the use to which they might be put, and public acceptance of the quality and advantageous use of its products had not been secured. It had a patented product and thus a legal monopoly under the patent law, but the monopoly itself would not start its mills running and create a demand for its product or an economical means of distribution of its product.

Celotex, on the other hand, had lost its patent case. The mandate of the Circuit Court of Appeals was about to issue enjoining it from manufacturing or selling hard board. Celotex, through twelve years of promotional work had created a strong public acceptance of its soft board insulation products. By the expenditure of millions of dollars in advertising and sales promotion it had established the local lumber yard and the local material supply dealer,

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*Its employees were in such dire financial straits that it sponsored a community canning operation by its employees in its own plant in order that its employees might can their food at low cost to enable them to maintain themselves during the period Masonite had little work for them because there was no outlet for its products (R. 672-674).

of which there were over 20,000 in the United States, as an established distributive agency for soft board insulation products. It had laid at least the foundation for securing the acceptance by these local lumber yards and material supply dealers of hard board products as an additional item for distribution by them (R. 642). Despite the fact Celotex was in receivership, twelve years of fair dealing and the consequent establishment of Celotex prestige with the local dealers augured well for the success of an effort by the Receivers and the new company to develop the distribution of hard board products through the local dealer, of which over 10,000 of the best were established customers of the Receivers of Celotex. There yet remained, nevertheless, much work and effort in the promotional field to establish a demand upon the part of the customers of these local dealers for hard board products, as yet relatively unknown to such customers.

It was in the light of these facts that the Celotex Receivers bargained with Masonite for an opportunity to continue their work in the hard board field. Following the approval of the resulting arrangement by the Federal Courts, for which the Receivers were acting, the entire Celotex organization prepared itself to make the country conscious of hardboard. Promotional work with dealers and their customers was undertaken. The advantages of being able to purchase both insulation and soft board in mixed car shipments at the carlot rate was emphasized, and public demand on the part of consumers was built up through promotional efforts. Celotex did its job. (See plaintiff's Ex. 29, R. 821; R. 644.)

In the early years of this agency arrangement Celotex sales overshadowed each of the other agents' and soon total

agents' sales overshadowed Masonite's sales (R. 644; Ex. S-56, R. 420). Masonite prospered. Its financial condition became such that it was enabled to spend money of its own in the further improvement of its products and in securing further public acceptance through promotional activities and national advertising. Largely as a result of these efforts of Celotex, the work of the other agents who came in later became easier.

In 1933 Masonite's plant was running at less than 30% of its normal capacity and its total sales was about 45 million feet of hardboard (R. 672). By 1942 it was producing and selling 243,000,000 feet of hardboard (Ex. S-56, R. 420). Using the Celotex prestige and the acceptance by both the consuming public and the dealers of any product sponsored by Celotex as a springboard, hardboard became a product accepted as a product of merit; its uses multiplied and the demand increased to the point where Masonite has steadily, year after year, expanded its facilities, increased its efficiency and improved its product until the patented hardboard product of Masonite has become one of the standard products in the building trade (R. 644). Coincidentally with this expansion program, Masonite has developed from a company that was practically bankrupt in 1933 to one of the largest and most prosperous companies in the building material supply field. Its activities and its prestige have grown and it is today an important and prosperous company strongly entrenched in the building field and able to cope with any competitor in most of the fields of the synthetic building material industry.

The natural growth of the importance and use of hardboard has resulted steadily in an almost universal practice on the part of dealers, all of whom desire rapidly to

turn over their stocks and to purchase their materials in the most economical manner, to purchase both soft board structural insulation products and hardboard products in the same carlot shipment. Each dealer has become accustomed to receiving from his supplier of insulation products both hardboard and soft board insulation. The building material supply industry has developed to the point that a company having only a partial line of synthetic materials operates at a tremendous economic disadvantage (R. 644).

The Appellant seeks in this suit to have this Court either find that the agreements between Masonite and its agents are outside the scope of the *General Electric* case, or to overrule the *General Electric* case. Fundamentally, the position of the Appellant is that these agreements should be set aside because they are inconsistent with what the Anti-Trust Division conceives at the moment to be the "public interest". The Appellant insists that the relief it seeks is necessary to avoid monopoly, prevent the suppression of competition and to restore free competitive enterprise.

The granting by this Court of the relief requested by the Appellant would produce a result diametrically opposed to the purposes of the Sherman Act as construed by this Court.

The Celotex Corporation stands enjoined from engaging in the hardboard business. The cancellation of its agency agreement with Masonite by court mandate in this case can only result in stopping Celotex from further competition in the distribution of these hard board products until 1945 when the Masonite patent expires. By that time Celotex will have lost its position as a distributor of hard board products and it will have lost a large portion of its structural insulation business to the Masonite Cor-

poration, which also manufactures structural insulation, because of the obvious advantages of the Masonite position which permits Masonite to sell the dealer both hardboard and soft board insulation products for delivery in the same car at a carlot price. Celotex, prevented from distributing hard board products by the injunction in the patent suit, could then sell structural insulation only in those limited cases where a dealer should be willing to purchase a full car made up solely of insulation. It is obvious that Celotex could not absorb as its own expense the difference between the carlot rate and the "less-than-carlot rate" and were it to do so, its carlot business would be gone, as the dealer will naturally purchase the minimum quantity at which he can secure the most favorable net price.

The other agents would be in an identical plight. In addition, the agents would lose a large part of their structural insulation business due to the desire of dealers to purchase their synthetic board products and structural insulation from a single source.

At the present time there is substantial, keen and effective competition among the agents in the sale of hardboard, in all respects except as to price (Findings, par. 37, R. 882). But the remedy which the Government seeks in this case could only result in the complete destruction of all competition in hard board products, leaving Masonite firmly entrenched in the hard board field and dominating the soft board insulation field through economic advantages that no competitor or group of competitors could possibly duplicate.

With all of its agents out of competition in the distribution of hard board products, on the basis of service, dealer help in sales promotion, prompt delivery and the manifold factors of competition other than price, Masonite

alone would reap the harvest of almost a decade of effort upon the part of the agents, to promote and establish the widespread acceptance of its products and the dealer channels of distribution. Its huge plants could sell their entire outputs to willing customers clamoring for the product. It would eliminate as hard board competitors, during the remaining years of the life of the Masonite basic patent, all of the competitors in the material supply industry. It would obviate for Masonite the risk that when its patent expires in 1945 these agents will have established dealer outlets for hard board products of their own manufacture. It would postpone for years, following the expiration of the patent in 1945, the time when (if ever) these agents could re-acquire these established dealer outlets for hardboard products. The inevitable result would be to destroy all incentive to give to the public the service which competition between the agents has required.

But more than that, Masonite would be placed in a position to gain a virtual monopoly in the manufacture and sale of insulation board as well, for the reason that customers who desired to purchase mixed car quantities of hardboard and insulation board could only make such purchases from Masonite. And most large dealers insist upon the right to purchase mixed car quantities and both types of board from the same dealer.

Looking back to the early period of Masonite's existence, when it stood practically alone in the field, it was found that dealers demanded the "exclusive" in their local territory (R. 673). Masonite hardboard, which had a list price to the dealer of $46 per thousand, was sold to the consuming public at prices as high as $120 per thousand because there was only a single dealer in the town who could handle

the product (R. 673). Is it a return to these conditions that the Appellant desires?

Aside from the question of public interest, there also arises the question of common fairness, of fair treatment of its citizens by the Government in efforts to enforce the Antitrust Laws and to extend their application. The efforts of the Appellant in this case, if successful, would result not only in a situation detrimental to the public interest but in oppression of these companies who have in good faith openly entered into an agreement of which the Anti-Trust Division and the public must have had knowledge and which has been viewed complacently by the Government for almost a decade.

It has been broadly stated that laches is not imputable to the Government of the United States. *United States* v. *Michigan*, 190 U. S. 379, 405 (1903), *United States* v. *Dalles Military Road Co.*, 140 U. S. 599 (1891). There are, however, numerous exceptions to this doctrine and the question whether laches, as such, is an absolute bar to a suit by the Government was left open in the latest decision by this Court on the question. *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 240 (1922). In anti-trust cases this Court has, on at least two occasions, taken into account, in determining the remedy to be applied, the consequences of a remedy which would result in injustice to the defendants, by reason of the conditions innocently created by the parties during a period of acquiescence by the Department of Justice. *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 45-47 (1918), *United States* v. *United States Steel Corporation*, 251 U. S. 417, 452-3 (1920). See also *United States* v. *General Electric Co.*, 15 F. (2d) 715, 719.

If the *General Electric* case is to be narrowed in its scope or overruled in its entirety, as the Appellant urges, an unconscionable result will be obtained so far as these agents are concerned. Their plight will be an intolerable one.

The Appellant has blithely assumed that if these agreements are cancelled, Masonite will immediately offer to the agents an opportunity to purchase from Masonite the hardboard necessary to supply the dealers, whom they regularly serve, on a basis where agents, with no plant investments and with public demand established, may sell hardboard products at any price, and perhaps relying upon their other products as their principal means of profit. But this is an unwarranted assumption in the light of the undisputed facts.

The old Celotex Company and its Receivers sought in 1933 to work out such an arrangement with Masonite, but without success despite the fact that at that time Masonite was literally starved for production for its plants. Today its plants are running on a twenty-four hour basis. It needs not sales outlets but only more productive capacity. Masonite, having proceeded in good faith to sustain the validity of its agency arrangement, will if Appellant prevails in this case have no incentive to enter into any such sale arrangements and such an arrangement would today, and during the remainder of the life of its patents, be distinctly against the financial interest of Masonite and its stockholders.

Let us further consider the plight of Celotex (which is similar to that of the other agents) under the circumstances. The Celotex Corporation has expanded its productive capacities of insulation board to the limit. It is operating on a twenty-four hour day basis; and it has speeded up its machinery and improved its processes to secure the maximum

output of its plants. The major portion of its entire production is being devoted to war purposes, including cantonments, homes for munitions workers and others employed in war industries, and for manufacturing uses concerned with the war effort too manifold to enumerate (R. 649). Its English plant is being operated exclusively for the British Government in the English war effort. The American plant is sharing its raw material with the English plant despite raw material shortages.

Even if Celotex were able to find a legal way to avoid the injunction against it, it could not manufacture hard board because it now has no facilities available for that purpose. As a result of priorities the machinery and equipment, including power plants and electrical equipment, essential to carry on the manufacture of hard board could not be procured for many years. It is doubtful if starting now it could have productive capacity for making hardboard ready by 1945, when the Masonite patents will expire (R. 649).

Certainly there is nothing in the conduct of the agents which would justify their being placed in this intolerable position. This record is barren of anything which shows bad faith, improper motives or willful wrong-doing by any of the agents with its own property.

At the trial, in discussing the 1941 agreement, which admittedly is the only agreement under which the parties are acting or intend to act, Appellant's counsel conceded that its only criticism of that agreement was the imposition by Masonite of the prices at which its agents sell.* The

*"I was about, when we adjourned, to point out to your Honor that the thing which we objected to in these contracts and the only thing was the price provision. An agency contract

agents did not ask or desire that Masonite fix the prices on hardboard for which they were to be authorized to solicit orders.

The criticism of the Appellant is, in effect, that Masonite has not granted to its agents all of its rights and for that reason restrains trade and commerce in violation of the Sherman Act. Would the cancellation of the many rights which it has granted lessen that restraint? Obviously, it would revest in Masonite all of the rights of an absolute monopoly which it had prior to the making of the original agreements. In the interest of justice, we feel compelled to urge upon the Court that if the *General Electric* case is to be modified or its scope so limited that this agency arrangement is to be held a violation of the Anti-trust Laws, the relief granted should, in all fairness, be granted in a manner consistent with the public interest and so as not unjustly to bear upon the innocent. If any criticism or blame is to be leveled at the agency relationship in this case, it cannot properly be leveled at the agents. It can only be directed, if at all, against Masonite which insisted upon retaining, and imposed successively upon the agents who did not desire it, the right of Masonite to tell its agents at what price to sell Masonite's patented hardboard.

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is not objectionable under the anti-trust laws merely because it is an agency contract; even the control of agents in a number of respects is obviously unobjectionable and cannot be criticized under the law. The things we are attacking, and attacking primarily here, are the provisions which control the price at which the agents sell, at the same time putting those limitations upon as competitive power of Masonite so far as concerns its own prices. That is the only part of the contract that we are really attacking. * * *. I should like to point out to your Honor that those price provisions are apparently of interest only to Masonite" (R. 749-750).

A new interpretation of the Anti-trust Laws should not be used to ruin financially these agents who have been guilty of no wrong and to benefit and entrench Masonite in an absolute monopoly.

If the *General Electric* case is to be modified or overruled, the order of this Court should provide the machinery (or direct the trial court to do so) for operation under these agreements in such manner that the best interests of the public may be well served and to the end that these agents may not be deprived of their hard earned and highly deserved position in the hard board field.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

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Appellee Certain-teed Products Corporation hereby joins in this brief and respectfully submits that the judgment of the court below should be affirmed.

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